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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

EDWARD H. JESPERSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari To The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Randall W. Richards
COUNSEL FOR PETITIONER
Richards, Caine & Allen
2568 Washington Blvd. #200
Ogden, Utah 84401
(801) 399-4191

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QUESTION PRESENTED

Should this Court grant certiorari to review the U.S. District Courts' decision, and the Second Circuit Court of Appeals affirmation of that decision, that the submission of a document, in petitioners possession, under order of a grand jury subpoena constitutes the criminal offense of Obstruction of Justice 18 U.S.C. § 1503.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

Fifth Amendment

STATEMENT OF THE CASE 2

ARGUMENT 3

APPENDIX 6

TABLE OF AUTHORITIES

Page

Case Cited:

Fisher v. United States, 425 U.S. 391,
48 L.Ed. 2d 39, 96 S.Ct. 1569, (1976)..... 4,5

OPINION BELOW

The United States District Court, Eastern Division, District of New York, denied Petitioner's timely made requests for jury instructions, entered jury instructions over timely made exceptions and denied Petitioner's timely filed Motion for Judgment of Acquittal, which resulted in the conviction of the Petitioner of the charge of Obstruction of Justice in contravention of 18 U.S.C. § 1503. On September 7, 1995 the United States Court of Appeals for the Second Circuit affirmed that decision and held that there was some evidence that the contract document presented by the Petitioner in compliance with the grand jury subpoena was drafted in response to the grand jury subpoena and therefore constituted the offense charged. [U.S. v. Jespersen, 65 F.3d 993 (2nd Cir. 1995) (App. 1-20)] The Second Circuit Court of appeals denied Petitioner's Motion for Reconsideration on October 18, 1995. (App. 26).

JURISDICTION

Judgment of the United States District Court, Eastern Division, District of New York, was entered on July 15, 1994, and the United States Court of Appeals for the Second Circuit affirmed that decision on September 7, 1995, and denied a Motion for Reconsideration on October 18, 1995. Petition for Writ of Certiorari was filed January 16, 1996. Extension to correct defects in form was granted until April 2, 1996. This Court's jurisdiction to consider this petition from the final judgment of the U.S. Court of Appeals is conferred pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

. . . Nor shall he be compelled in any criminal case to be a witness against himself, . . .

STATEMENT OF THE CASE

In November of 1993, the Petitioner was indicted by a Grand Jury sitting in the Eastern District of New York on three counts, including Count II, which charged that petitioner had, on or about July 23rd, 1992, committed Obstruction of Justice by creating and producing a false document to the Grand Jury duly impaneled in the Eastern District of New York. Trial on this matter was held on the 7th day of March, 1994 through the 11th day of March, 1994, which resulted in a verdict of guilty on Count II, which Count is the subject of this appeal.

The Obstruction of Justice charge arose from an investigation beginning in December of 1991 regarding allegations of payment of a gratuity by a Philip Temerario (dba Vinton Construction) to the petitioner, Ed Jespersen, (petitioner Jespersen was acquitted on the gratuity charge at the same trial). During the course of the investigation, the petitioner met at least one time with IRS agents and in July of 1992 was served with a Subpoena directing him to produce any invoices, bills, estimates, canceled checks, and cash receipts relating to improvements on some property where he lived at 340 N. Michigan Avenue.

Petitioner Jespersen flew from his home in Utah to New York on the 23rd day of July, 1992, and delivered to one

William Ziebel a contract/cash receipt relating to improvements done on his home by Philip Temerario dba (Vinton Construction). The petitioner, when meeting with agent William Ziebel, simply delivered the document and told Ziebel that "he wasn't going to make any statements."

The document was drafted by Philip Temerario, and all the writing contained in the contract (with the exception of one signature of Norma Jespersen) was the writing of Philip Temerario. Both the Prosecution and the defense agreed that the document in question was delivered by Temerario to petitioner Ed Jespersen approximately February to April of 1992. The Petitioner excepted to several jury instructions regarding Count II and the petitioner additionally requested that a materiality instruction be included, which requests were denied by the Court. After the jury found the petitioner guilty of Count II, the petitioner made timely motions and appeals on the issue. The United States Court of Appeals for the Second Circuit ruled that there was one statement in evidence that indicated a post subpoena drafting of the document and therefore, despite acknowledgment from both Prosecution and Defense to the contrary, affirmed the conviction. (App. 1-25).

ARGUMENT

It is respectfully contended that the United States Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The issue that Petitioner raises is whether the submission of a document, not of petitioners authorship but in petitioners possession, to a grand jury pursuant to a duly served subpoena should constitute a criminal offense of obstruction of justice.

This Court has addressed the issue of Fifth Amendment privileges concerning documents in an individuals possession which is not of his authorship in the case of Fisher v. United States, 425 U.S. 391, 48 L.Ed 2d 39, 96 S.Ct. 1569, (1976). In that case however, the court made a determination based upon a request for Fifth Amendment protection rather than in a situation where obstruction of justice had been charged. In Fisher v. United States, the Court was presented with a case in which a taxpayer's attorney was summonsed to produce relevant documents that the attorney had been given by the taxpayer's accountant. In that case the Court held,

> "A subpoena served on a taxpayer requiring him to produce an accountant's work paper in his possession without doubt involved substantial compulsion. But it does not compel oral testimony: nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications." (Id. at 48 L.Ed 2d 55).

In the present case the petitioner was served with a grand jury subpoena and, had two options. He could either destroy or fail to surrender the contract/receipt in question which would clearly constitute obstruction of justice, or he could produce said document to the grand jury. The petitioner's Fifth Amendment Constitutional protection would give him the unencumbered right to simply produce the document and not say or do anything further. However, his Fifth Amendment rights did not extend to him the privilege of refusing to produce said document since the document in question did not constitute

compelled testimony.

The trial court had difficulty dealing with the issue and reversed itself several times before instructing the jury on the case. It is troubling that the trial court required the petitioner to conform his actions to a course on which even the Judge himself was uncertain. This Court should not place upon an individual a burden so imposing that criminal prosecution will result if a legal conclusion is made incorrectly.

In the present case petitioner Jespersen was subpoenaed by a Grand Jury to produce the document in question. Under the trial Court's theory of the case, petitioner Jespersen then was required to make a legal decision regarding his proper exercise of his Fifth Amendment privilege against self incrimination.

On the one hand if the petitioner chose to exercise his Fifth Amendment right by not producing any document, under the Fisher decision, he would be guilty of obstructing justice or contempt by refusing to obey a Grand Jury subpoena. On the other hand, if he makes the decision to produce the document under Grand Jury subpoena, then he is prosecuted for obstruction of justice as he was in the present case.

Even the trial Court wavered on such a decision with an initial ruling that the production of a simply back dated contract was not a crime and then reversing itself fourteen hours later saying the production of the identical document could indeed be construed as a crime.

This Court has never placed such an onerous burden on a defendant where the resulting consequences of an incorrect legal determination could result in conviction and incarceration.

Respectfully submitted, this 3 day of January 1996.

RANDALL W. RICHARDS
Attorney for Petitioner